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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91171281
Party	Defendant Jarrow Formulas, Inc.
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Date	12/30/2015
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PomWonderful LLC, Opposer, v. Jarrow Formulas, Inc., Applicant.	Opposition (Parent) No.: 91171281 Marks and Consolidated Proceedings: Opp. No. 91171281 (Parent) re POMAMAZING Opp. No. 91171283 re POMEGREAT Opp. No. 91171284 re POMESYNERGY Opp. No. 91173117 re POMOPTIMIZER Opp. No. 91173118 re POMGUARD Opp. No. 91186414 re POMEZOTIC Opp. No. 91191995 re PRICKLYPOM Opp. No. 91194226 re POM and POM

APPLICANT JARROW FORMULAS, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR JUDGMENT UNDER 37 C.F.R. § 2.132(a)

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I. INTRODUCTION

Vigilantibus non dormientibus aequitas subvenit – "Equity aids the vigilant, not those who slumber on their rights." *Cornetta v. U.S.*, 851 F.2d 1372, 1375 (Fed. Cir. 1988). Now roused from a months-long slumber, Opposer PomWonderful LLC ("PWI") appeals to equity to re-set the trial schedule after PWI failed to introduce any evidence or testimony during its trial period nine months earlier. In essence, PWI's argument rests on a single email, which it contends constitutes a blanket agreement by Jarrow Formulas, Inc. ("Jarrow") to consent to any and all extension requests made by PWI, whenever made (and apparently even if never made). Unfortunately for PWI, the plain language of that email, and of PWI's subsequent correspondence, belie the existence of any such agreement. PWI was not betrayed; it was asleep at the switch. PWI's substantial delay was entirely its own doing, and PWI should not be permitted to further prolong, at significant cost to Jarrow and the Board, these nearly decade-old proceedings. Accordingly, Jarrow's Motion for Judgment (D.E. # 93/94) should be GRANTED.

II. ARGUMENT

A. THE PARTIES HAD NO STANDING AGREEMENT WITH RESPECT TO FUTURE DEADLINES

PWI points to a single email from March 24, 2014 (the "March Email") to evidence Jarrow's alleged blanket agreement to any and all scheduling requests made by PWI. However, the plain language of the March Email, as well as subsequent correspondence from PWI's counsel, belie that assertion.

First, PWI's interpretation of the March Email as a blanket agreement to future adjustments of the trial schedule ignores the plain meaning of Jarrow's counsel's words. The March Email references counsel's "understanding that we would stipulate to adjust the *current*

deadlines as needed if settlement discussions were to break down." (Ex. 1) (emphasis added).[1] The plain meaning of "current" is "occurring in or existing at the present time." (Ex. 2). That the parties agreed then and at other times to adjust then-existing deadlines does not transform the plain meaning of "current," nor does it justify adopting PWI's strained interpretation of the March Email.

Second, PWI's own correspondence disproves the existence of any such blanket agreement between the parties. As a result of their communications in late March and early April 2014, the parties moved to extend the close of PWI's testimony period to July 8, 2014. (*See* D.E. ## 85-87). As the parties approached the opening of PWI's testimony period (June 8, 2014), PWI's counsel made the following request of Jarrow:

> Considering how close we are and considering the June 8th deadline for us, *can we agree* between us to extend *this date* as needed and agree to file an extension with the TTAB if we don't get this wrapped up?

(Ex. 3) (emphasis added). PWI's counsel followed up two days later "to check on the timing issue" and again asked "*[c]an we have an agreement* between us to work out the dates as needed?" (*Id*.) (emphasis added). PWI's own words show that it did not believe that the parties had reached a blanket agreement with respect to future deadlines after the March Email, and it cannot now credibly argue otherwise.

B. PWI'S RELIANCE ON *FORT HOWARD PAPER* AND *GEORGOPOLOUS* IS MISPLACED BECAUSE THERE WAS NO AGREEMENT BETWEEN PWI AND JARROW

Because there was no blanket agreement between the parties, PWI's reliance on *Fort Howard Paper Co. v. Kimberly-Clark Corp.*, 216 U.S.P.Q. 617 (TTAB 1982) to impose on Jarrow an obligation to provide "ample warning" is misplaced. Unlike in *Fort Howard*, PWI's

[1] Citations to "Ex. __" refer to the Exhibits to the Declaration of David Ewen, attached hereto.

position is not supported by "substantial correspondence" establishing an understanding between the parties that included a commitment to provide "ample warning" if a party would not agree to re-set deadlines. *Id.* at 618; *see also PolyJohn Enterprises Corp. v. 1-800-Toilets, Inc.*, 61 U.S.P.Q.2d 1860, 1862 (TTAB 2002) (distinguishing and noting *Fort Howard* involved "an extensive record of correspondence evidencing the parties' pattern of conduct"). Rather, PWI relies entirely on the March Email, which by its terms pertained only to *current* deadlines, not future deadlines. PWI clearly did not believe otherwise when corresponding with Jarrow two months later as the opening of its re-set trial period approached. (Ex. 3). Thus, *Fort Howard* is inapposite as Jarrow neither reached a forward-looking agreement with PWI nor committed to provide PWI with "ample warning" as did the applicant in *Fort Howard*. 216 U.S.P.Q. at 618.

Likewise, *Georgopolous v. Int'l Brotherhood of Teamsters,* 164 F.R.D. 22 (S.D.N.Y. 1995) is distinguishable. In that case, the defendant filed an unopposed motion to re-open its period to file an answer after allegedly relying on "a stipulation for an extension of time that was *agreed to by the parties* but that was never submitted to [the] Court." *Id*. at 23 (emphasis added). As detailed above, there was no such agreement in this case. In addition, the court's finding of excusable neglect was based in part on the defendant's quick action to cure its error and the lack of any objection from the plaintiff. *Id*. Here, PWI's first request of the Board to re-open its trial period came on December 10, 2015—eight and half months after its close—and then only in response to Jarrow's Motion. Accordingly, *Georgopolous* does not support PWI's position.

C. *ATLANTA-FULTON COUNTY ZOO* AND *VITAL PHARMACEUTICALS* DID NOT DISPLACE THE GENERAL RULE THAT RELIANCE ON SETTLEMENT NEGOTIATIONS DOES NOT EXCUSE A PARTY'S LACK OF DILIGENCE

PWI attempts to distinguish *Atlanta-Fulton County Zoo v. DePalma*, 45 U.S.P.Q.2d 1858 (TTAB 1998) and *Vital Pharmaceuticals v. Kronholm*, 99 U.S.P.Q.2d 1708 (TTAB 2011) on the

grounds that in those cases, "the parties were not in true settlement negotiations." (D.E. # 96 at 14). However, in neither case did the absence of settlement negotiations affect the outcome. While the Board in *Vital Pharmaceuticals* did observe that "it does not appear that the parties were engaged in any meaningful settlement discussions," before making that observation the Board stated, unequivocally, that "while attempts at settlement are favored, they do not excuse an opposer's failure to act within the prescribed times." *Vital Pharmaceuticals v. Kronholm*, 99 U.S.P.Q.2d at 1711 (citing *Atlanta-Fulton County Zoo*, 45 U.S.P.Q.2d at 1859). That the Board in *Vital Pharmaceuticals* and *Atlanta-Fulton County Zoo* also questioned the veracity of the opposers' representations did not displace the general rule about relying on the existence of settlement negotiations. Accordingly, PWI has still failed to offer any explanation for its months of inactivity in these proceedings.

D. PWI INCORRECTLY MINIMIZES ITS DELAY AND THE IMPACT ON THE BOARD

PWI argues that "[e]ven if an additional one year is added to the proceeding (from the time [PWI's] testimony period closed until the Board reaches a decision on Jarrow's Motion) it is a relatively small amount of time given the complexity of the set of underlying disputes." (D.E. # 96 at 8). However, PWI cites no case to support discounting the length of the delay in this manner, and glosses over the fact that re-opening the trial periods at this late stage could easily push final resolution of this matter into 2017. The Board has clearly held that months-long delays like PWI's are substantial. *See Vital Pharmaceuticals v. Kronholm*, 99 U.S.P.Q.2d 1708, 1710-11 (TTAB 2011) (re-opening trial period that closed seven months earlier "would cause substantial delay").

PWI also incorrectly dismisses the impact on judicial proceedings as insignificant. (D.E. # 96 at 8). But the Board has not been so cavalier about the issue. The Board has over the years

reiterated its interest in deterring motion practice stemming from "sloppy practice or inattention to deadlines." *Pumpkin Ltd. v. The Seed Corps.*, 43 U.S.P.Q.2d 1582, 1588 (TTAB 1997); *see also PolyJohn*, 61 U.S.P.Q.2d at 1862 ("Both the Board and parties before it have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as the motions decided herein"). Accordingly, the second *Pioneer* factor, the length of the delay and its impact on judicial proceedings, also weighs in Jarrow's favor.

E. PWI FAILS TO REFUTE THE EVIDENCE OF ITS BAD FAITH

PWI claims there is no evidence demonstrating its bad faith and instead accuses *Jarrow* of acting in bad faith by moving for judgment. (D.E. # 96 at 16). But the record tells a different story. Jarrow has patiently and in good faith sought closure to proceedings that PWI commenced in 2006. Each time Jarrow thought the parties were on the verge of settlement, PWI pulled back, changed its position on issues that had been extensively negotiated, and/or raised new issues and demands. (D.E. # 93/94 at 2-3). Despite this, Jarrow attempted in good faith—repeatedly and over a nearly nine-year period—to work with PWI in an effort to settle the matter. (*Id.*). In light of the history of this matter, it is ironic that PWI asserts that Jarrow acted in bad faith, after PWI repeatedly pulled back, engaged in tactics of shifting positions and delay that drained Jarrow's resources, and then simply ignored this matter, Jarrow, and the Board's schedule, in favor of other matters apparently more deserving of its attention.

III. CONCLUSION

For the reasons set forth herein and in Jarrow's opening brief (D.E. # 93/94), Jarrow respectfully requests that the Board enter judgment against PWI.

Respectfully submitted,

McCARTER & ENGLISH, LLP

Dated: December 30, 2015

By: */s/ Mark D. Giarratana*

Mark D. Giarratana, Esq.
David Ewen, Esq.
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185 Asylum Street
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Attorneys for Jarrow Formulas, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2015, the foregoing document was submitted for filing to the Trademark Trial and Appeal Board through the ESTTA system and a copy of this paper has been served upon Opposer's attorney of record via first class mail, postage pre-paid, at the address shown below:

Danielle M. Criona, Esq.
ROLL LAW GROUP P.C.
11444 West Olympic Blvd.
Los Angeles, California 90064
Danielle.Criona@Roll.com

/s/ David Ewen
David Ewen

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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PomWonderful LLC Opposer, v. Jarrow Formulas, Inc., Applicant.	Opposition (Parent) No.: 91171281 Marks and Consolidated Proceedings: Opp. No. 91171281 (Parent) re POMAMAZING Opp. No. 91171283 re POMEGREAT Opp. No. 91171284 re POMESYNERGY Opp. No. 91173117 re POMOPTIMIZER Opp. No. 91173118 re POMGUARD Opp. No. 91186414 re POMEZOTIC Opp. No. 91191995 re PRICKLYPOM Opp. No. 91194226 re POM and POM

DECLARATION OF DAVID EWEN

I, David Ewen, pursuant to the requirements of 28 U.S.C. § 1746, declare that the following is true and correct.

1. I am an attorney with the law firm of McCarter & English, LLP, of Hartford, Connecticut, attorneys of record for Jarrow Formulas, Inc. ("Jarrow") in these consolidated opposition proceedings. I make this Declaration in support of Jarrow's Reply in Support of Its Motion for Judgment under 37 C.F.R. 2.132(a). I have personal knowledge of the matters set forth in this Declaration.

2. Attached hereto as **Exhibit 1** is a true and accurate copy of email correspondence sent by Jarrow's counsel, Mark D. Giarratana, to Opposer PomWonderful LLC's ("PWI's") counsel, Michael M. Vasseghi, dated March 24, 2014.

3. Attached hereto as **Exhibit 2** is a true and accurate copy of the online Merriam-Webster definition of the word "current," accessed on December 30, 2015 at the URL http://www.merriam-webster.com/dictionary/current.

4. Attached hereto as **Exhibit 3** are true and accurate copies of email correspondence sent by PWI's counsel, Danielle M. Criona, to Jarrow's counsel, Mark D. Giarratana, dated June 4, 2006 and June 6, 2006.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: December 30, 2015

David Ewen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 30, 2015, the foregoing document was submitted for filing to the Trademark Trial and Appeal Board through the ESTTA system and a copy of this paper has been served upon Opposer's attorney of record via first class mail, postage pre-paid, at the address shown below:

Danielle M. Criona, Esq.
ROLL LAW GROUP P.C.
11444 West Olympic Blvd.
Los Angeles, California 90064
Danielle.Criona@Roll.com

/David Ewen/
David Ewen

Exhibit 1

Ewen, David

From: Giarratana, Mark
Sent: Monday, March 24, 2014 7:25 PM
To: 'Vasseghi, Michael'
Cc: Criona, Danielle; Ewen, David
Subject: RE: Jarrow - Notice of Testimony by J. Adams

Michael:

Danielle and I have not spoken since receiving her latest settlement counter last Wednesday, so it was not my understanding that we were at a stalemate. But if you (or she) and your client believe otherwise, I will take your word for it.

In any event, I have oral argument at the Federal Circuit on April 8th and therefore we are not available on the proposed date for the deposition. Danielle and I have had a practice of working cooperatively to accommodate each others' schedules, and an understanding that we would stipulate to adjust the current deadlines as needed if settlement discussions were to break down. In view of the foregoing, I trust we can work cooperatively to modify the scheduling order so that both parties can preserve their ability to conduct trial depositions.

Mark

Mark D. Giarratana // Partner
McCARTER & ENGLISH, LLP

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BOSTON // HARTFORD // NEW YORK // NEWARK
PHILADELPHIA // STAMFORD // WASHINGTON, DC // WILMINGTON

-----Original Message-----
From: Vasseghi, Michael [mailto:MVasseghi@Roll.com]
Sent: Monday, March 24, 2014 6:26 PM
To: Giarratana, Mark
Cc: Criona, Danielle
Subject: Jarrow - Notice of Testimony by J. Adams

Mark,

Exhibit 2

1

current

play
adjective cur·rent \'kər-ənt, 'kə-rənt\

Simple Definition of *current*

Popularity: Top 30% of words

- : happening or existing now : belonging to or existing in the present time
- : aware of what is happening in a particular area of activity

-
-
-
-
- Cite!

Full Definition of *current*

1. *1 a archaic* : running, flowing*b (1)* : presently elapsing *<the current year> (2)* : occurring in or existing at the present time *<the current crisis> (3)* : most recent *<the magazine's current issue>*
2. *2* : used as a medium of exchange
3. *3* : generally accepted, used, practiced, or prevalent at the moment *<current fashions>*

cur·rent·ly *adverb*
cur·rent·ness *noun*

See current defined for English-language learners

See current defined for kids

Examples of *current*

1. The dictionary's *current* edition has 10,000 new words.
2. Who is your *current* employer?
3. We need to keep *current* with the latest information.

Origin of *current*

Middle English *curraunt,* from Anglo-French *corant,* present participle of *cure, courre* to run, from Latin *currere* — more at car

First Known Use: 14th century

Related to *current*

Synonyms

conventional, customary, going, popular, prevailing, prevalent, standard, stock, usual

Exhibit 3

Ewen, David

From: Criona, Danielle <DCriona@Roll.com>
Sent: Friday, June 06, 2014 6:58 PM
To: Giarratana, Mark
Cc: Ewen, David; Vasseghi, Michael
Subject: RE: Jarrow Formulas, Inc. - PomWonderful, Inc. - CONFIDENTIAL SETTLEMENT COMMUNICATION UNDER FRE 408

Mark,

I don't want to rush the agreement part of this but wanted to check on the timing issue. Can we have an agreement between us to work out the dates as needed?

Danielle M. Criona, Esq.
Senior Counsel - Intellectual Property
Roll Law Group PC Ph. 310.966.8771

From: Criona, Danielle
Sent: Wednesday, June 04, 2014 10:02 AM
To: 'Giarratana, Mark'
Cc: 'Ewen, David'; Vasseghi, Michael
Subject: RE: Jarrow Formulas, Inc. - PomWonderful, Inc. - CONFIDENTIAL SETTLEMENT COMMUNICATION UNDER FRE 408

Hi Mark,

[redacted]

[redacted]

I have a lunch meeting and may get called to another couple of meetings today but am otherwise around and available to talk about this (I do need to leave at 4:15 PST today though).

Considering how close we are and considering the June 8th deadline for us, can we agree between us to extend this date as needed and agree to file an extension with the TTAB if we don't get this wrapped up?

Danielle M. Criona, Esq.
Senior Counsel - Intellectual Property
Roll Law Group PC Ph. 310.966.8771

From: Criona, Danielle
Sent: Tuesday, June 03, 2014 10:15 AM
To: 'Giarratana, Mark'
Cc: 'Ewen, David'